

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Spartanburg County Court of Common Pleas

ORIGINAL

J. MARK HAYES, II, CIRCUIT JUDGE

2011-ES-42-00162
Case No. 2012-CP-42-3705

Willie A. Rogers and Vennie Rogers.....Appellants,

vs.

Charles Carr, in his Individual and Official Capacity as the Personal
Representative of the Estate of Thurman L. Bomar, Deceased, Katherine
Christian and Joyce King..... Respondents.

FINAL REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

I.

THE RESPONDENTS' ADDITIONAL SUSTAINING GROUND THAT THE APPELLANTS DO NOT HAVE STANDING TO CONTEST THE LAST WILL AND TESTAMENT OF THURMAN BOMAR BECAUSE THEY ARE NOT HIS HEIRS IS WITHOUT MERIT BECAUSE THIS ISSUE IS NOT BEFORE THIS APPELLATE COURT AS THE APPELLATE (CIRCUIT) COURT BELOW FOUND IT UNNECESSARY AND UNIMPORTANT TO ADDRESS THE PATERNITY OF APPELLANTS' MOTHER BUT THE RESPONDENTS DID NOT FILE A CROSS-APPEAL OF THE LOWER APPELLATE COURT'S FINDING AND THE ISSUE OF THE PATERNITY OF APPELLANTS' MOTHER WAS NOT PRESERVED FOR THIS APPEAL.

It is well settled that an issue in a lower court must be appealed to be preserved for a higher Appellate Court to address it on an appeal. The Respondents' Additional Sustaining Ground herein that the Appellants do not have standing to challenge the Last Will and Testament because they are not his heirs **is and was not preserved for this appeal** because the Respondents did not file a Cross-appeal of the lower Appellate court's Finding that it was unnecessary to address the paternity of Appellants' mother as it was unimportant. (R., pp. 3-5).

In the present appeal, the Appellants did **not** appeal this Finding by the lower Appellate (Circuit) Court that **“it was unnecessary to address the paternity of Appellants' mother” and/or “the issue of whether the appellants qualify as intestate**

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heirs is not important” (emphasis added), because **“the Respondents did not appeal these findings and/or issue(s).”** Accordingly, the issue of the “Paternity of Appellants’ mother” and “whether the Appellants have standing to challenge the Last Will and Testament of Thurman Bomar **are not issues which were preserved for this appeal.**

Since the Appellants did not appeal this issue, it was up to the Respondents to appeal this issue to preserve it for appeal. Section 203 (c) of the S. C. Appellate Court Rules states as follows:

(c). Cross-appeals. A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties within five (5) days after receipt of appellant’s notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires.”

Here, the Respondents did not file a **Cross-Appeal** of the lower Appellate (Circuit) Court ‘s finding that “it was unnecessary to address the paternity of Appellants’ mother and/or “the issue of whether the appellants are intestate heirs is not important.”

Accordingly, the issue raised in the Respondents’ “Additional Sustaining Ground” that the Appellants do not have standing to challenge the Last Will and Testament of Thurman Bomar because the Appellants are not heirs of Thurman Bomar **is not an issue before this Appellate Court as it was not preserved for this appeal.**

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II.

ALTHOUGH THE APPELLANTS DID NOT SPECIFICALLY USE THE WORDING "CIVIL CONSPIRACY" OR SET FORTH A SPECIFIC CAUSE OF ACTION OF A CIVIL CONSPIRACY IN THEIR PLEADINGS, ALL OF THE ELEMENTS OF CIVIL CONSPIRACY WERE ARGUED AND EVIDENCE WAS PRESENTED AT TRIAL BY THE APPELLANTS AND IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO CONFORM ITS FINDINGS TO THE EVIDENCE PRESENTED AT TRIAL AS APPELLANTS HAD SATISFIED AND PROVEN ALL THE ELEMENTS OF A CIVIL CONSPIRACY AGAINST THE RESPONDENTS.

Section 15 (b) of the SCRCF says as follows: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to **conform to the evidence** and to raise these issues may be made upon motion of any party at any time, **even after judgment**, but failure so to amend **does not affect the result of the trial on these issues.**(Emphasis added).

Here, the Appellants did not raise a cause of action of a Civil Conspiracy in their pleadings (R., pp. 31-36). However, the Appellants presented evidence to satisfy a Cause of Action of a Civil Conspiracy inasmuch as it was presented to the court down below that the Respondents, Charles Carr and his sister, Katherine Christian, combined and agreed to **file a false Petition to probate** Thurman Bomar's Estate and, by filing this **false Petition**, the Respondents intentionally tried to hide the existence and names of the Appellants, Willie Rogers and his brothers and sisters, who were the only surviving heirs

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of the decedent, Thurman Bomar. Please note that these **joint Respondents hid the existence of the Appellants although the Respondents were aware that the Appellants were the nephews and nieces of the decedent and had socialized and had social outings with them when they first came to South Carolina in the 70's and 80's** (R. pp. 107-108).

The Appellants satisfied all the elements of a Civil Conspiracy. A Civil Conspiracy exists when there is: 1) A Combination of two or more persons; 2) joining for the purpose of injuring the plaintiff; and 3) which causes the plaintiff special damages, McMillian vs. Oconee Mem'l Hosp., Inc. 367 S. C. 559, 626 S. E. 2d 884 (2006).

In this within case, the Appellants presented sufficient information against the Respondents to satisfy all of the three (3) following elements of a Civil Conspiracy: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff; and (3) which causes him special damages, Vaught vs. Waites, 300 S. C. 201, 387 S. E. 2d 91 (S. C. Ct. of App., 1989.)

Since as set forth above, the court can allow the pleadings to conform to the evidence, **even after judgment**, it was error for the trial court to fail to conform the pleadings in this cause and find that the Appellants had clearly shown and established a Civil Conspiracy against the Respondents.

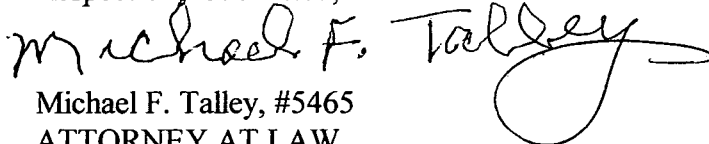
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CONCLUSION

For the foregoing reasons and Appellants' Arguments set forth in their Initial Appellants' Brief, the Judgment and decision entered against the Appellants by the Spartanburg Probate Court and affirmed by the Spartanburg County Circuit Court sitting as an Appellate Court **should and must be reversed.**

Respectfully Submitted,



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Dated: September 25, 2013

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PROOF OF SERVICE

I certify that my office has served three (3) copies each of the Appellants' Final Brief, the Appellants' Final Reply Brief and the Record On Appeal upon the Respondents, Charles Carr, in his Individual and Official Capacity as the Personal Representative of the Estate of Thurman L. Bomar, Deceased, Katherine Christian and Joyce King, by depositing three (3) copies each in the United States Mail, postage pre-paid, on October 3, 2013, addressed to the Respondents' Attorney of record, Mr. Charles P. Edwards, 200 Library Street (Upstairs) P. O. Box 2552, Spartanburg, South Carolina, 29304.

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